MOTION FILED

MAR 18 1976

IN THE SUPREME COURT OF THE UNITED STATES

(District Court Civil No. M-74-29CA-2 — Sixth Circuit Court of Appeals Case Nos. 75-1989 and 75-1990)

THEODORE KOEHLER,

Petitioner-Appellant,

vs.

Supreme Court
No. 75-1292

ENOCH CHISM,

Respondent-Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

PEOPLE OF THE STATE OF MICHIGAN

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NOW COME the People of the State of Michigan, by and through the Office of the Calhoun County Prosecuting Attorney, and move this Honorable Court for Leave to File an Amicus Curiae Brief in the above-entitled cause for the following reasons:

1. A number of Amici have been granted permission at various times to file pleadings in this cause in both the state and federal proceedings in recognition of the vital interests and issues involved herein.

2. The People of Calhoun County, Michigan, where this heinous criminal offense was committed have a deep and abiding interest in seeing that the ends of justice are met in this case because of the obvious danger this offense presented to scores of people in Calhoun County and the potential of further danger should the Respondent-Appellee be released.

3. The Prosecuting Attorneys' Association of Michigan is an authorized and official representative of the Pros-

ecuting Attorneys of the State of Michigan, all of whom have an interest in the principles and outcome of this cause but, because of a budgetary cutback in the current fiscal year, said Association is unable to continue in an active role in the furtherance of this case, and, under these circumstances, it is urgently requested that the interests of the people of Calhoun County continue to be vigorously represented by counsel, who, while not in office at the time of the Chism trial, were and are intimately acquainted with the genesis and aftermath of that case.

4. Calhoun County is the county of trial jurisdiction and venue in the state criminal proceeding from which this cause arose, and, as the present chief law enforcement officer and prosecutor for that county, John J. Rae has ultimate responsibility for the trial and conviction of Enoch Chism.

5. The interest of, and presentations of, the Attorney General of the State of Michigan, while parallel, are not and cannot be so identical as to make an Amicus Brief in this cause redundant.

6. The issue presented in the instant case involves an important application of the constitutional guarantees of the right of an accused to a speedy trial and due process of law, and the movant believes himself capable of rendering valuable assistance to this Court in resolving these questions.

7. Your movant further prays this Honorable Court grant him an opportunity for oral argument in this cause. A proper and thorough oral presentation to the Court by one who is familiar with all of the positions and interests at stake including a thorough familiarity with the background of facts as is your movant in this case is essential to a just and conclusive determination of the issues.

8. The Brief Amicus Curiae is delivered to this Honorable Court along with this Motion.

WHEREFORE, the People of the State of Michigan, by the Office of the Calhoun County Prosecuting Attorney,

move this Honorable Court to grant its Motion for Leave to File an Amicus Curiae Brief in this cause and further grant it an opportunity for oral argument herein.

Respectfully submitted,

(s) John J. Rae
Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

Dated: March 8, 1976

AFFIDAVIT

STATE OF MICHIGAN
ss.
COUNTY OF CALHOUN

John J. Rae, being first duly sworn, deposes and says that he has read the foregoing, and it is true to the best of his knowledge and belief.

(s) John J. Rae
Calhoun County Prosecuting Attorney

Subscribed and sworn to before me this 8th day of March, 1976.

(s) Martha E. Williams
Notary Public, Calhoun County, Michigan
My commission expires: June 14, 1976

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PEOPLE OF THE STATE OF MICHIGAN

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ARGUMENT

THE DISTRICT COURT AS UPHELD BY THE COURT OF APPEALS IMPROPERLY APPLIED THE BALANCING TEST FOR A SPEEDY TRIAL CLAIM MANDATED BY *BARKER* v *WINGO* AND ERRED IN GRANTING RESPONDENT HABEAS CORPUS RELIEF.

At issue here is the re-application of the speedy trial standards of *Barker* v *Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101, 117 (1972), to the Michigan Supreme Court decision in *People* v *Chism*, 390 Mich 104; 211 NW2d 193 (1973), by a Federal District Court Judge on a petition for habeas corpus. Appellant submits that in attempting to justly balance the criteria for determining a speedy trial claim first laid down in *Barker*, and religiously and scrupulously followed by the Michigan Supreme Court in *Chism*, the district judge has erred.

The gist of the *Barker* formulations is indisputable:

> We can do little more than identify some of the factors which courts should assess on determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. (footnote omitted). 407 US 530; 33 L Ed 2d at 117.

The Court itself in its decision recognized that these criteria were not immutable and rigid totems whose intransigence should be allowed to thwart justice in a particular case, but rather symbols of the proper interplay between the interstices and interfaces of the concept of speedy trial. The concurring opinion of Justice Brennan in *Dickey* v *Florida*, 398 US 30, 47; 90 S Ct 1564; 26 L Ed 2d, 37-38 (1970), pointed out how these factors are to be balanced:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the find-

ing of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. *Barker,* 407 US at 533; 33 L Ed 2d at 118.

They do not stand alone but must be understood in light of the few, but pertinent cases which anteceded them, particularly, *United States* v *Ewell,* 383 US 116; 15 L Ed 2d 627; 86 S Ct 773 (1966), *Klopfer* v *North Carolina,* 386 US 213; 18 L Ed 2d 1; 87 S Ct 988 (1967), and *Dickey* v *Florida, supra.*

Of particular interest must be Justice Brennan's concurrence in *Dickey* v *Florida, supra,* 398 US 51-52; 26 L Ed 2d 40, and specifically this observation:

> When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. *Pollard* v *United States, supra,* at 361, 1 L Ed 2d at 399. See also *United States* v *Provoo, supra.* The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interest protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided — whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of reason for the delay, and, on the other hand, the length of the delay and its potential for prejudice to interests protected by the speedy trial safeguard . . .

Looking then to the application of these principles in the district court's opinion, we find not only a misapprehension as to the appropriate criteria, but an unconstitutionally over-weighing of some principles against the others.

Length of Delay

Appellant submits that there are two possible approaches to the computation of a length of delay: (1) actual total time period, arrest to trial, with appropriate consideration of that delay *in light* of the other criteria; (2) application of other criteria, particularly *cause* for delay, to the time period to reduce it to that period properly attributable to the prosecution and then application of a presumption of prejudice from such delay, *People* v *Chism, supra,* 144-145, Levin J., concurring. While *Amicus* is probably bound by the petitioner-appellant's record admission as to an apparent or surface appearance of an unreasonable delay as to the use of the first criteria, and deal with the district court's application thereof, it submits such an absolute test was not mandated by *Barker* and is improper in light of the court's specific command to strike a balance.[1] The use of the second formulation results in concentration on whether the *actually* attributable "down time" from arrest

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[1] The majority computation of time in *People* v *Chism, supra,* at 112-113 was an amalgam of the two tests postulated: The times break down to: 3 months in the trial court on the issue of indigency, including hearings, etc., prior to appeal and 9 months subsequent to appeal, of which 7 months were specifically to meet defendant's and his counsel's convenience, and were not properly the responsibility of either prosecutor, or trial court. Under "test 2", the period chargeable to the state is at most 16½ months. *Barker,* itself, seems to adopt the second approach in action, 407 US at 533-534; 33 L Ed 2d at 119. See also *United States* v *Rosenbloom,* 511 F2d 777 (CADC, 1974) refusing to include the time spent upon a successful interlocutory appeal by the prosecution in the speedy trial calculation, and *United States* v *Roemer,* 17 CrL 2088 2089, (CA 2, 4/8/75).

to prosecution is minimally sufficient to raise the issue. Under either analysis it is not so clear the time period examined herein was so presumptively prejudicial as to necesitate inquiry into the other factors.

Moreover, the Honorable Judge Freeman erred in using the time lapse *only* as a condition preeedent to further inquiry, (Op, p 7). While he evaluates the time period in light of the reasons for the delay, he fails to also balance the time period *against* the other criteria in the manner envisioned by the Court in *Barker*:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. 407 US at 530-531, 33 L Ed 2d at 117.

Thus, we have reversal for a 27 month delay when courts have upheld delays of 56 months, *Turner* v *Estelle*, 515 F2d 853 (CA 5, 7/9/75), *United States* v *Roemer*, 17 CrL 2088-2089 (CA 2, 4/8/75), 60 months, *Barker* v *Wingo, supra*, 21 months, and *United States* v *Shepherd*, 511 F2d 119 (1975).

Assertion of Right

Once again the court's opinion stops short of the required balancing of *Barker, supra*. It is not the fact of demand alone which must be considered, but the nature and insistence thereof:

> We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength

> of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived the right. 407 US at 531-532; 33 L Ed 2d at 117.

See also, *United States* v *Shepherd*, 511 F2d 119; 122-123 (CA 5, 1975), *United States* v *Latimer*, 571 F2d 498, 501 (CA 10, 1975).

Thus, the energy, spacing, and timing of the two ostensible demands must be considered against the backdrop of the factual tapestry in which they occurred. Viewed against this background it is not so clear that the defendant was so convinced of possible prejudice and desirous of trial as to alone justify penalizing the State of Michigan for granting him interlocutory review of an important issue. In fact, the defendant's activities in transferring his assets shortly after arrest strongly argue that the defendant was attempting to create as many roadblocks as possible to a successful prosecution of the case pending against him.

Prejudice to the Defendant

The district court relied upon *United States* v *Dyson*, 469 F2d 735 (CA 5, 1972), *United States* v *Macino*, 486 F2d 750 (CA 7, 1973), *United States* v *Rucker*, 464 F2d 823 (CADC, 1972), and *United States* v *Perry*, 353 F Supp 1235 (DC, 1973), and has apparently placed upon petitioner the burden of showing that respondent was not, in fact, prejudiced in the preparation of his defense by the delay in bringing him to trial. The Michigan Supreme Court had this to say on the issue:

> There is no testimony relevant to prejudice to defendant's defense because of the length of the case such as loss of witnesses, etc.

> In sum, defendant suffered considerable personal deprivation by long incarceration, but it cannot be said that his ability to defend himself was in any significant way prejudiced. *People* v *Chism, supra,* at 115.

In *United States* v *Roemer,* 17 CrL 2088, 2090 (CA 2, 4/8/75), the Second Circuit ruled that *Barker* requires an actual showing of real prejudice on the part of the defendant:

> Thus, the appellant contends that "some degree of prejudice should be presumed," but plainly the balancing test in *Barker* v *Wingo,* contemplates a showing of actual prejudice (Text).

See also *United States* v *Latimer, supra,* 502, and *United States* v *Baumgartner,* 17 CrL 2145, 2146 (CA 8, 5/1/75).

Reliance upon *United States* v *Dyson,* 469 F2d 735 (CA 5, 1972), is particularly suspect in light of *Turner* v *Estelle,* 515 F2d 853 (CA 5, 7/9/75), wherein the same Court of Appeals rejects defendant's claims of prejudice because of his failure to demonstrate the "prejudice" would have led to a different result. See also *United States* v *Shepherd,* 511 F2d 119, 123-124 (CA 5, 1975), where the defendant's attempt to prove prejudice from delay was not persuasive.

Reliance upon *United States* v *Macino,* 486 F2d 750 (CA 7, 1973), is also suspect in light of *United States* v *Calhoun,* 510 F2d 861, 865 (1975):

> No prejudice to defendant was claimed *or proved.* (emphasis added).
>
> • • •
>
> Further, there was *no proof* any witness was lost to defendant, or that any witness sought might testify favorably to him.[2] (footnote omitted, emphasis added.)

A meticulous reading of *United States* v *Rucker,* 464 F2d 823, 825 (CADC, 1972), reveals that the burden placed upon the prosecution is not to disprove a claim of prejudice, but

rather the burden of *justifying* attributable delay. (*Rucker* was decided in June of 1972, and makes no mention of, or use of, the contemporaneously decided *Barker.*)

Finally, it is incorrect that Courts have given *no* indication of their views as to the burden of showing some actual prejudice. See *United States* v *Franks,* 511 F2d 25, 37 (CA 6, 1975) and *Trigg* v *State,* 507 F2d 949 (CA 6, 1974).

Nor is a finding of some actual prejudice to the defense the end of the inquiry. There is prejudice and there is prejudice. The nature of the prejudice, and its importance or significance to the preservation and presentation of the defense must be balanced and weighed in the scales constructed by *Barker.* There has never been any indication, even now, that the residue of physical evidence within the exhibit bottle was, or is, insufficient for a valid analysis, nor any indication of a possible reason to suspect any fault, error, or contrivance in the State's analysis of the contents as lye.

As to defendant's alleged loss of memory — while this problem affects and prejudices all witnesses in a criminal case, the petitioner was in a unique and unusual position to protest against just this harm. While *other* witnesses might be lost to the defense through defendant's incarceration or their loss of memory, the petitioner had instant access to, and good reason to protect, his own recollections surrounding the times, places and actions in controversy. On balance, the alleged prejudice claimed herein was insufficient to support a finding of denial of the constitutional right to a speedy trial.

Reason for Delay

It is here, more than anywhere else, that *Amicus* must take issue with the findings and rulings of the district court. When one couples the court's conclusion (Op, p 14), with his earlier discussion of, and the reason for, and blame of the appellate process for, the delay in bringing the defendant to trial, the result is a rule that if a defendant, through counsel (and it should be pointed out appointed counsel), can file a sufficient number of interlocutory appeals, each to be dispatched by the appellate

courts, he can on his own create a total period so lengthy as to deny himself a speedy trial.

But how is it that recourse to the appellate courts on interlocutory appeal can have this effect? Particularly when the appeal is for the defendant's benefit and presents a critical issue for determination. Did not the United States Supreme Court opine:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Barker,* 407 US at 531; 33 L Ed 2d at 117.

and:

> However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v *Haubert,* 198 US 77, 87; 49 L Ed 950, 954; 25 S Ct 573. "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . The delay must not be purposeful or oppressive," *Pollard* v *United States,* 352 US 354, 361; 1 L Ed 2d 393,

> 399; 77 S Ct 481. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v *United States,* 360 US 1, 10; 3 L Ed 2d 1041, 1048; 79 S Ct 991. *United States* v *Ewell, supra,* 383 US at 120; 15 L Ed 2d at 630-631 (1975).

See also, *United States* v *Rosenbloom,* 511 F2d 777 (CADC, 1974), rehearing den en banc, 511 F2d 784 (1975). *United States* v *Shepherd, supra,* 122:

> Under *Barker,* neutral factors causing the delay are to be weighed less heavily against the government than an attempt by the government to prejudice the defense by delay. It is undisputed that the delay in this case resulted from the action or inaction of the district court rather than from any action, much less misconduct, of the prosecution. We therefore assign little weight to this factor in assessing the Shepherd's claim.

Considered in its proper setting, this appeal came to a still fledgling appellate court before *Barker* had been decided at a time when it was struggling out from under the problems of its birth and an inundation of criminal appeals (two "visiting" judges sat on the appeal). It presented a critical issue under both the United States, Amend VI, and Michigan, CONST 1963, Art I, Sec 20, Constitutions; and under *Gideon* v *Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 789 (1963), trial judges were offered little guidance in resolving this question. Because the right to *appointed* counsel only applied to *indigents* in the criminal justice system the question of how to determine indigency, or whether a defendant could create "anticipatory indigency" was a vital and complex one. The Court of Appeals' final treatment of, and resolution of, the matter and the length of time that Court took to determine this issue of first impression in Michigan is no indication that long and hard thought and anguish did not go into the opinion, or that a more expeditious handling of the case was possible.

Legitimate differences of opinion and judgment concerning questions of fact and law are bound to arise in the course of lawsuits. Appellate courts are established to resolve such differences.

Whenever a trial judge errs in ruling on a question that arises before (as here), during or after the trial of a case and the defendant seeks and obtains reversal on appeal and trial or a new trial follows, the delay in the commencement of the trial or the new trial is attributable, in a sense, to the ruling found on appeal to have been erroneous.

Sometimes, albeit infrequently, the trial which ultimately results in a defendant's affirmed conviction occurs many years after the defendant's arrest because of delay attributable to mistrials or new trials granted by the trial judge or, as here, a successful appeal.

Lawyers, judges, trial and appellate, often differ. Such differences and the time required to resolve them through the time consuming appellate process does not deny a defendant a speedy trial. *People* v *Chism, supra*, at 143-44. Levin J., concurring.

The issue here then is not crowded dockets, etc., or prosecutorial effort to deliberately postpone the trial, *United States* v *Drummond*, 511 F2d 1049, 1054 (CA 2, 1975), but the orderly expedition of an effort to insure the rights of the accused. In fact, and as the record in this case clearly shows, both the prosecution and defense agreed to cut in half the time for the normal filing of the interlocutory appeal and, in fact, did so. The proper and considered movement of the law should not be derailed to expedite the bringing of a criminal case to trial helter-skelter. Thus, in *Turner* v *Estelle, supra*, the Fifth Circuit, relying upon *Arrant* v *Wainwright*, 462 F2d 677 (CA 5, 1972) held that it was a valid and justifiable reason for delay of trial, i.e., a period not chargeable to the State of Texas, to await outcome of the defendant's pending trial on a capital offense:

> If a delay to enable the prosecution to locate witnesses and accumulate evidence is valid, it is also valid for the state to wait until it is clear that the expense, inconvenience to witnesses and jurors, burden on prosecutorial and judicial resources, and vexation to the defendant that a trial inevitably causes will in fact be necessary . . . Within ten months of the time at which it became clear a trial would be necessary, petitioner was brought to trial. We conclude that this factor weighs heavily against finding a denial of Turner's right to a speedy trial. 17 CrL 2335.

Delay has been recognized as prejudicial to the State's case as well, *Barker, supra*, 407 US 521-522; 33 L Ed 2d 111-112. The district court unfairly blames and punishes the State for the defense-requested delay in the granting of the motion to endorse an expert witness. Yet defense counsel knew beforehand of the endorsement, and indicated a readiness for trial while the motion was pending decision. With no reason to doubt either the expertise of, or suspect bias on the part of, this expert, the defendant chose to request a delay of the trial — such time period should *not* have been weighed against the prosecution, for as the Supreme Court observed in another context:

> Certainly it is clear beyond question that the double jeopardy clause does not guarantee a defendant that the government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. . . . The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interest, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. *United States* v *Jorn*, 400 US 470, 483-484; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Conclusion

The district court applied and considered each of the *Barker* tests independently and failed to properly evaluate them in the balancing concept demanded by *Barker* itself. He improperly placed the burden of going forward on the issue of prejudice upon the petitioner, and failed to properly evaluate the reason for and effect of the delay. In so doing, it was inevitable that he would come to an incorrect decision on the merits of respondent's speedy trial claim. The petition for habeas corpus should have been denied.

RELIEF

WHEREFORE, the Amicus Curiae on this Brief requests this Court rule upon the appeal herein as it deems justice and the law requires.

Respectfully submitted,

JOHN J. RAE (P 19188)

Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

Dated: March 8, 1976